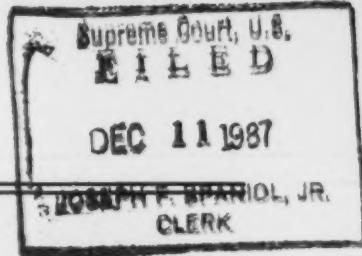


No. 87-762



In The  
**Supreme Court of the United States**  
October Term, 1987

WALTER C. EWERS,

*Petitioner,*

v.

BOARD OF COUNTY COMMISSIONERS  
OF THE COUNTY OF CURRY,

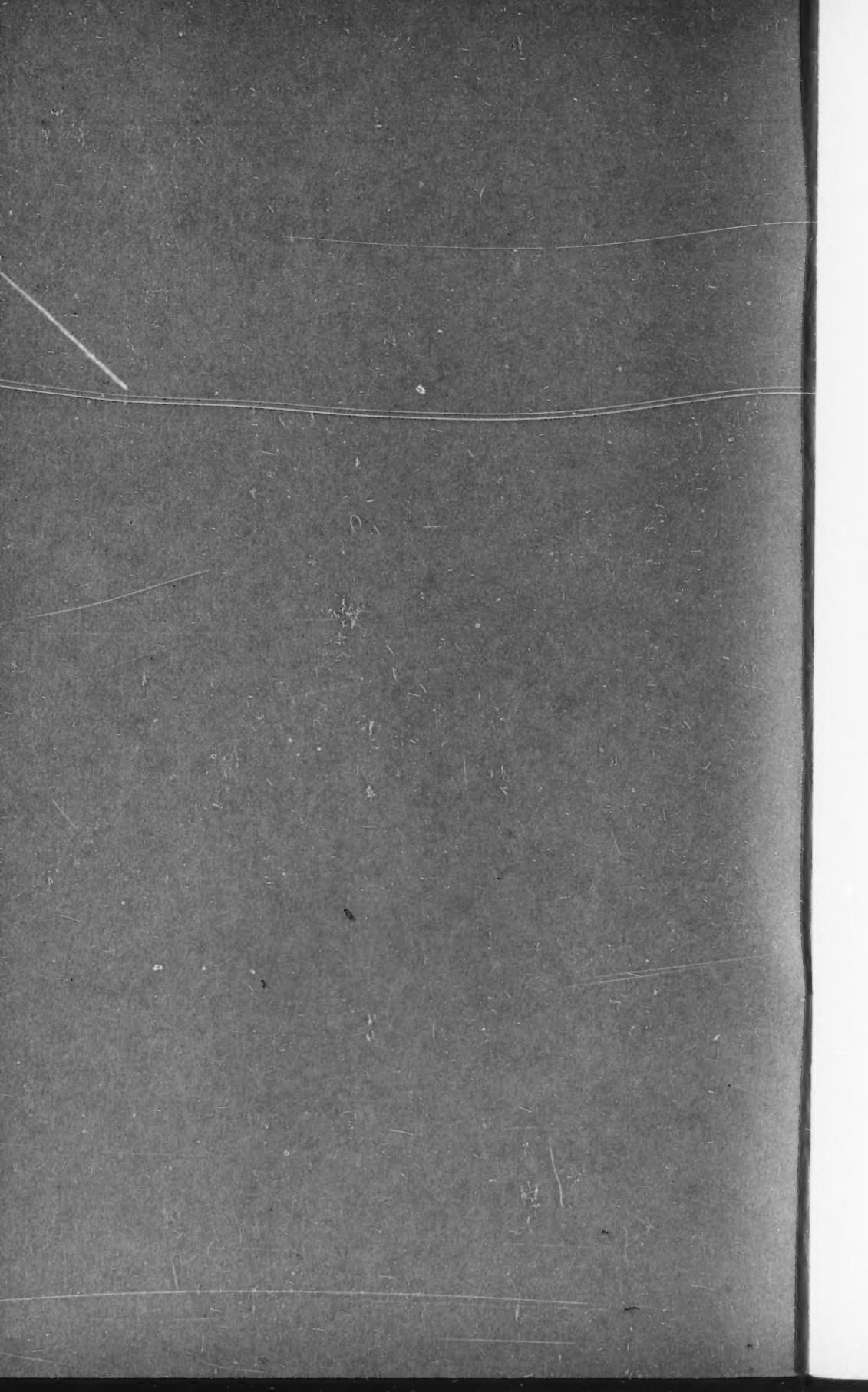
*Respondent.*

On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Tenth Circuit

**BRIEF IN OPPOSITION**

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**QUESTION PRESENTED**

Whether the United States Court of Appeals for the Tenth Circuit correctly held that Petitioner failed to present sufficient evidence that his alleged constitutionally protected speech was a substantial, motivating factor in the elimination of his position and whether, if decided, the United States Court of Appeals for the Tenth Circuit correctly held that Petitioner's speech was not constitutionally protected.

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
STATEMENT OF THE CASE .....	1
REASONS FOR DENYING THE WRIT .....	5
1. This case presents only a question of the sufficiency of evidence, and does not merit this Court's exercise of its Certiorari jurisdiction .....	5
2. The court of appeals correctly held that the record bore no evidence of protected speech which was a substantial, motivating factor in the Board's decision to eliminate the position of road superintendent .....	6
3. The court of appeals could have properly held that Ewers' speech was not constitutionally protected .....	9
4. The opportunity to draw a distinction between "mixed motive" and "pretext" cases is not before this Court .....	12
CONCLUSION .....	14
APPENDIX A .....	App. 1

## TABLE OF AUTHORITIES

	Page
<b>CASES:</b>	
<i>Air Exec, Inc. v. Two Jacks, Inc.</i> , 584 F.2d 942 (10th Cir. 1978) .....	11
<i>Connick v. Myers</i> , 461 U.S. 138 (1983) .....	11, 12
<i>Delano v. Kitch</i> , 663 F.2d 990 (10th Cir. 1978).....	11
<i>General Talking Pictures Corp. v. Western Elec- tric Co.</i> , 304 U.S. 173 (1937) .....	6
<i>Hodgson v. Humphries</i> , 454 F.2d 1279 (10th Cir. 1972) .....	11
<i>Jurgensen v. Fairfax County</i> , 745 F.2d 868 (4th Cir. 1984) .....	12
<i>Mt. Healthy City School Board of Directors v. Doyle</i> , 429 U.S. 274 (1977) .....	9, 13
<i>Schmidt v. Fremont County School Dist. No. 25</i> , 588 F.2d 982 (10th Cir. 1977) .....	12
<i>United States v. Desert Gold Mining Co.</i> , 433 F.2d 713 (9th Cir. 1970) .....	10
<i>United States v. V.E.B. Hougham</i> , 364 U.S. 310 (1960) .....	10
<i>Wilson v. City of Littleton</i> , 732 F.2d 765 (10th Cir. 1984) .....	12
<i>Zimzores v. Veterans Administration</i> , 778 F.2d 264 (5th Cir. 1985) .....	10
 <b>CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT</b>	
<b>42 U.S.C. SECTION 1983 .....</b>	<b>4</b>
<b>Sup.Ct.R. 17.1 .....</b>	<b>6</b>
<b>Fed.R.Civ.P. 56(d) .....</b>	<b>10</b>

## TABLE OF AUTHORITIES—Continued

	Page
<b>MISCELLANEOUS</b>	
6 J.Moore, W. Taggart & J. Wicker, <i>Moore's Federal Practice</i> , ¶ 56.20 (2d ed. 1987) .....	10
6 J.Moore, W. Taggart & J. Wicker, <i>Moore's Federal Practice</i> ¶ 57.20 (2d ed. 1987) .....	10

## STATEMENT OF THE CASE

The controversy giving rise to this lawsuit occurred in 1981 when Respondent Board of County Commissioners of the County of Curry (Board) eliminated the position of county road superintendent. Petitioner Walter C. Ewers (Ewers) had occupied that position since 1977.

As county road superintendent, Ewers was charged with the supervision of construction and maintenance of over 1,200 miles of county roads, as well as the activities of sixteen road employees. Ewers reported directly to the Board. Decision-making power regarding where and how to utilize the road employees and equipment ultimately resided with the Board. Pursuant to the Board's directives, Ewers would supervise the road projects. Among Ewers' duties were the direction and coordination of cooperative road programs with the State of New Mexico.

In 1980, Michael Gattis and Anita Merrill were elected to fill two of the three positions on the Board. During his campaign, Gattis pledged improved efficiency in the management of county government. Specifically, Gattis promised to improve what he considered to be the poor condition of the county roads. Similarly, Merrill asserted that the county roads were unsatisfactorily maintained. After her election, but prior to taking office, Merrill attended several Board meetings. Based on her observations at these meetings, Merrill, before taking office, began to question the utility of maintaining the position of road superintendent.

Gattis and Merrill, thus, shared the belief that the county roads lacked care and maintenance. Both of the

new commissioners agreed that the sources of the poor road conditions were the structure and operation of the road department. According to the road maintenance scheme then in place, Ewers alone bore the responsibility of supervising the roadwork in each of the county's three districts. Contrary to the current system, Gattis and Merrill concluded that a decentralized mode of road upkeep would better serve the county's need. In a decentralized system, each district would have its own road foreman who would be at each job daily to supervise the work. The districts would be correlated with each of the three board member's districts; thus, the district foreman would report directly to the board member who represented that district. The responsibility for coordinating the inter-district roadwork would reside with the Board.

Ewers asserts that, rather than the Board's desire to achieve the above-described reorganization of county services, the elimination of the road superintendent position was due to his exercise of two distinct instances of purportedly protected speech: (1) an exchange with an earlier board concerning snow removal from private roads and (2) statements concerning the nature of and need for cooperative road projects.<sup>1</sup>

The first instance of purportedly protected speech occurred in 1980 at one of the Board meetings attended by Merrill after her election but prior to her assumption of office. At this meeting, Ewers asked the Board what he should do if private citizens requested the county to re-

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<sup>1</sup> Evidence was also presented regarding Ewers' comments concerning his speech as a proxy for the County Fair Board; his speech as a conduit through which the Board was informed of citizens' complaints, principally concerning road problems; and as a 'man who spoke his mind.'

move snow from their property. Board member Charles Stockton told Ewers that, to some extent, it was the individual's own responsibility. Ewers replied that Stockton's position bothered him, as it seemed to be contrary to public need; in addition, the county might be liable should a mishap occur. After that particular meeting, Ewers asked Board member-elect Merrill her opinion on the matter. Merrill stated the county should clear private roads only after county roads were attended.

The second instance of Ewers' claimed protected speech occurred during his meetings with the new Board. The first meeting commenced on January 5, 1981, in Ewers' absence. The Board rehired all road employees, except Ewers, and voted to withhold action on Ewers' position until he could be present for a discussion of road department policies and his position in general.

The Board next met on January 12, 1981, in a closed special meeting, to discuss personnel problems and job responsibilities. The Board discussed the county roads and expressed a desire that more attention be given to the roads. Ewers, who had been notified to be present at the meeting, attended for 30 to 45 minutes, and did not argue with the Board. The meeting was subsequently opened, and the Board announced that it had made no decision as to whether to continue the current road department arrangement, but would announce its decision at its regular meeting on January 19, 1981.

When the Board met, in regular, open session on January 19, 1981, Ewers attended for approximately two hours. The main topics of discussion were the cooperative road projects and the length of time it took to complete them. The Board only sought information from Ewers

concerning how the cooperative projects worked and why the projects required so much time. The Board was seeking to ascertain the exact cause of the delays; it was concerned that cooperative projects placed inordinate demands on the road equipment. Ewers offered his explanations to the Board. After Ewers left the meeting, the Board voted to abolish the position of road superintendent.

In response, Ewers brought suit under 42 U.S.C. Section 1983 in the United States District Court for the District of New Mexico. Ewers charged, *inter alia*, that the Board eliminated the road superintendent job in retaliation for his exercise of his First Amendment right of free speech.

Prior to trial, the Board moved for summary judgment on Ewers' First Amendment claim. The district court denied the Board's motion, finding that Ewers had engaged in speech on a matter of public concern. In forming the pre-trial order, however, the court listed for trial as a Contested Issue of Law: "whether the statements purportedly made by [Ewers] constituted constitutionally protected speech." *See Appendix A.* No objections were raised to the inclusion of this issue in the pre-trial order; indeed, the parties presented evidence, and the protected speech issue was litigated in its entirety. The district court instructed the jury that it had ruled, as a matter of law, that Ewers' speech was constitutionally protected.<sup>2</sup>

The jury returned a general verdict for Ewers. The Board appealed to the United States Court of Appeals for

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<sup>2</sup> It should be noted that in ruling on the Board's motion for a directed verdict at the close of evidence, the district court stated that in ruling on the summary judgment it had already declared, as a matter of law, that Ewers' speech was protected.

the Tenth Circuit, arguing that the district court erred in determining and submitting the First Amendment issue to the jury. The court of appeals refused to decide the protected speech issue because the record from the summary judgment proceeding was not before it. Petition for Certiorari, App. 5. The court, however, held that because the instruction was overly broad and because the record contained no evidence of protected speech which could have been a substantial, motivating factor in the Board's decision to terminate the road superintendent position, the district court erred in submitting the First Amendment question to the jury. *Id.*, App. 9-10. Accordingly, the court remanded the First Amendment issue with the instruction that judgment be entered against Ewers. *Id.*, App. 17. Ewers now petitions this Court to issue a Writ of Certiorari to consider his First Amendment claim.<sup>3</sup>

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#### **REASONS FOR DENYING THE WRIT**

**1. This case presents only a question of the sufficiency of evidence, and does not merit this Court's exercise of its certiorari jurisdiction.**

In his Petition, Ewers urges that the court of appeals erroneously held that his speech was not protected under

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<sup>3</sup> Following entry of the court of appeals' opinion, Ewers petitioned the court to reconsider its reversal of his First Amendment claim and its affirmance of the district court's grant of summary judgment to the Board on Ewers' claim of deprivation of property without due process of law. The court of appeals denied the request to reconsider the First Amendment question but granted Ewers' request to rehear the property claim. Rehearing on the property issue is currently pending before the court of appeals.

the First Amendment. Petition for Certiorari, at 7. Ewers, however, has misinterpreted the court of appeals' holding. This case does not concern whether the court exceeded its power of review; rather, this case presents only the straightforward question of whether sufficient evidence supported instructing the jury on the First Amendment issue. As such, this case presents no question which merits this Court's issuance of a writ of certiorari.

This Court will grant a writ of certiorari to review a decision of a lower court only when there are "special and important reasons therefor". Sup.Ct.R. 17.1. Among those "special and important reasons" are cases giving rise to conflicting or inconsistent decisions or cases raising important questions of federal law that require attention by this Court. *Id.* Certiorari, however, is rarely granted when, as here, the issue before the Court revolves solely around whether a jury instruction was supported by sufficient evidence to merit submission to the jury. See *General Talking Pictures Corp. v. Western Electric Company*, 304 U.S. 173 (1937) (this Court will not grant certiorari to review the evidence or inferences therefrom).

**2. The court of appeals correctly held that the record bore no evidence of protected speech which was a substantial, motivating factor in the Board's decision to eliminate the position of road superintendent.**

Prior to trial, the district court denied the Board's motion for summary judgment on the First Amendment issue. Petition for Certiorari, App. 26. The court denied the Board's motion on the basis of its ruling that Ewers' speech in favor of the county/state cooperative agreements and in support of county removal of snow from

private property involved matters of public concern, and as such, deserved First Amendment protection. *Id.* According to the court of appeals, the case proceeded to trial on the issue of whether Ewers' First Amendment rights had been violated.<sup>4</sup> *Id.*, App. 5-6. In order to prove this violation, Ewers was required to show that his utterance of these statements was a substantial, motivating factor in the Board's abolition of the position of road superintendent.

Following the presentation of evidence, the district court instructed the jury on the First Amendment issue as follows:

In order to prove his claim that Defendants violated the first amendment rights, the Plaintiff must establish, by a preponderance of the evidence, each of the following elements:

1. That Plaintiff engaged in constitutionally protected speech, in that he commented about matters of public interest and concern. You are instructed that I have determined, as a matter of law, that the Plaintiff engaged in constitutionally protected speech, and that this element of his first amendment claim has therefore been established;
2. That Plaintiff's exercise of protected speech was a substantial and motivating factor in the decision of the Defendants to abolish his position as Road Superintendent; and
3. That Plaintiff's interest in commenting upon matters of public concern outweighed the Defendants' in-

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<sup>4</sup> The Board respectfully disputes the court of appeals' characterization of the procedural posture of the trial. As discussed fully in its Point 3, *infra*, the Board contends that the issue of whether Ewers' statements were constitutionally protected was fully and properly litigated at trial.

terest in restricting Plaintiff's expression of his views because such expression hampered or obstructed the efficient operation of the Road Department.

On appeal, the Board argued that the court erred in instructing the jury on the First Amendment claim. According to the Board, Ewers' speech was not constitutionally protected because it did not involve matters of public concern; the district court erred in failing to weigh the Board's interest against Ewers' interest and that balance tipped in favor of the Board; and the jury instruction was faulty in that it did not specifically articulate the instances of protected speech.

On review, the court of appeals concluded that because the full record was not before it, it could not properly consider whether Ewers' speech involved matters of public concern, and thus, was constitutionally protected. Petition for Certiorari, App. 7. The court, however, agreed that Ewers' First Amendment claim merited reversal, holding that "[T]he court improperly instructed the jury on Ewers' First Amendment claim and in submitting the claim to the jury." *Id.*, App. 8. According to the court of appeals:

[T]he court's instruction on Ewers' First Amendment claim was overly broad. It allowed the jury to improperly speculate on the "conduct" (speech) which Ewers contended to be the 'motivating factor' in the Board's decision to abolish the position of county road superintendent. The trial record simply does not contain any evidence of such protected speech. Thus, there was no basis in fact upon which the jury could intelligently reach a damage award. Under such circumstances, the court erred in submitting the claim to the jury.

*Id.*, App. 9-10.

The court's holding was explicitly two-fold. First, the court agreed that the instruction should have specifically identified which speech was protected. Moreover, and dispositive of whether a remand should issue, the court concluded that the record was devoid of any protected speech which could have substantially motivated the Board in deciding to eliminate the position of county road superintendent. Thus, a remand would have been unavailing because the court's holding concerned not only an erroneous instruction but also a failure of proof.

Ewers simply failed to fulfill his burden of showing that his speech concerning the cooperative schemes and county snow removal played a substantial role in motivating the Board to terminate the position of road superintendent. *Mt. Healthy City School Board of Directors v. Doyle*, 429 U.S. 274 (1977). As such, the court of appeals did not usurp the jury's function. To the contrary, the court correctly limited its review to the propriety of submitting the First Amendment instruction to the jury.

**3. The court of appeals could have properly held that Ewers' speech was not constitutionally protected.**

Assuming Ewers' contention is correct that the court of appeals did what it said it could not, that is, determine that Ewers' speech was not constitutionally protected, such a holding would have been entirely proper. Despite the court of appeals' reservation to the contrary, this issue was properly before it, as the pre-trial order squarely framed the issue for full trial.

In ruling on the Board's motion for summary judgment, the district court found that, while Ewers' statements

involved matters of general public concern, the Board had not presented evidence of whether Ewers' expression had hampered the efficient operation of the road department. Therefore, "summary judgment on the first amendment issue [was] inappropriate." Petition for Certiorari, App. 27.

This holding was, at most, a partial summary adjudication under Rule 56(d) of the Rules of Civil Procedure. As such, the ruling was interlocutory in nature and subject to change by the court at any time prior to entry of final judgment. 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 57.20 (2d ed. 1987); *Zimzores v. Veterans Administration*, 778 F.2d 264 (5th Cir. 1985); Cf. *United States v. Desert Gold Mining Co.*, 433 F.2d 713 (9th Cir. 1970). Upon entry of a partial summary judgment, the court was required to enter an order specifying the facts which existed without substantial controversy. The district court here chose not to do so; therefore, "[a]ll of the issues, as framed by the pleadings, [were] open for trial." 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* at ¶ 56.20.

After issuance of its memorandum opinion and order, the district court entered a pre-trial order. App. A. Listed among the Contested Issues of Law in this order was "whether the statements purportedly made by [Ewers] constituted constitutionally protected speech." Ewers took no exception to the order, and did not move to amend or alter its contents.

The pre-trial order, therefore, defined and controlled the questions and issues at trial. *United States v. V.E.B. Hougham*, 364 U.S. 310 (1960). Where, as here, no objec-

tions or motions to amend the order were made, the order governed not only the factual and legal dimensions of the trial, but also presided over, and could not be challenged on, appeal. *Hodgson v. Humphries*, 454 F.2d 1279 (10th Cir. 1972); *Air-Exec, Inc. v. Two Jacks, Inc.*, 584 F.2d 942 (10th Cir. 1978); *Delano v. Kitch*, 663 F.2d 990 (10th Cir. 1978). Thus, the question of whether Ewers' speech was constitutionally protected was fully tried and was before the court of appeals: Appellate review of the issue would have been complete and meaningful.

Moreover, in order to claim constitutional protection, Ewers' speech, first, must have involved a matter of public concern, and, second, his interest in that speech must have outweighed the interests of the Board "in the effective and efficient fulfillment of its responsibilities to the public." *Connick v. Myers*, 461 U.S. 138, 143, 150 (1983). Ewers' speech, however, not only failed to meet the standard of public concern but also failed any balancing of interests.

The content, form, and context of Ewers' statements reveal their inadequate status. Ewers' snow removal comments were initiated by him as an inquiry to the Board, his direct supervisor. Ewers sought guidance concerning the scope of his official responsibility in the event the county was requested to remove snow from private property. His purpose was not to inform the public, but to inquire of his duties, an operational matter of the road department. The subject matter of this speech was not of inherent public interest, and there was no evidence that snow removal was a matter of public debate. Ewers simply spoke as an employee on job-related matters within the organizational context. See *Connick v. Myers*,

461 U.S. 138, 149, n.8; *Wilson v. City of Littleton*, 732 F.2d 765, 769 (10th Cir. 1984); See also *Schmidt v. Fremont County School Dist. No. 25*, 588 F.2d 982, 984-85 (10th Cir. 1977); *Jurgensen v. Fairfax County*, 745 F.2d 868, 879 (4th Cir. 1984).

Nor does Ewers' speech regarding cooperative projects amount to speech on a matter of public concern. Ewers attended Board meetings as an employee, and was speaking in direct response to inquiries from his immediate supervisor. Ewers was fielding questions from and responding to the concerns raised by the Board; Ewers was not criticizing or arguing with the Board. Ewers was clearly and solely involved in an internal inquiry concerning the road department.

Even assuming Ewers' speech involved matters of public concern, his limited interest in such speech was outweighed by the Board's interest. Ewers was either inquiring about his official functions or responding to Board inquiries concerning these functions. Against this, the Board had determined that (a) the centralized supervisory position of road superintendent was inefficient and (b) the past operation of cooperative projects in conjunction with normal road work had been unsatisfactory and inefficient. In viewing the Board's asserted interest, the court of appeals could have properly held that these interests outweighed any limited interest of Ewers. Because such a balancing has been recently prescribed by this Court, no issue for certiorari is presented.

4. The opportunity to draw a distinction between "mixed motive" and "pretext" cases is not before this Court.

This case presents no occasion to distinguish between "mixed motive" and "pretext" cases. This Court has long held, in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), and its progeny, that an employee bears the burden of proving that an expression of constitutionally protected speech was a motivating factor in the government's decision to alter his employment status. In attempting to meet that burden in this case, not only were instances of Ewers' comments concerning cooperative agreements and county snow removal placed before the jury, but the jury also heard testimony regarding Ewers' speech as a proxy for the County Fair Board; as a conduit through which the Board was apprised of citizen complaints, mainly concerning road problems; and as 'a man who spoke his mind.'

The jury, however, was not instructed as to which of these instances of speech deserved the safeguard of the First Amendment; indeed, there was no finding by the district court that all of Ewers' utterances were constitutionally protected. On that basis, the court of appeals was absolutely correct in its conclusion that "[j]urors must be knowledgeable of the 'protected conduct' (or speech) in order to find that the conduct was a 'motivating factor' in the action being challenged." Petition for Certiorari, App. 9. Otherwise, juries may improperly speculate on which speech, protected or not, motivated the government's conduct. That result, as here, is directly at odds with this Court's guidance in *Mt. Healthy*, and, in no way, merits this Court's consideration.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

/s/ ARTHUR P. BROCK  
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**APPENDIX A**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

WALTER C. EWERS,

Plaintiff,

vs.

BOARD OF COUNTY COMMISSIONERS OF  
THE COUNTY OF CURRY, et al.,

Defendants.

**PRE-TRIAL ORDER**

(Filed July 3, 1984)

An Initial Pre-Trial Report having been filed in this action on September 26, 1983 which required presentation of a Pre-Trial Order to the Court, the following action was taken:

1. **JURISDICTION AND PARTIES:** This is an action for damages brought by plaintiff based on a claim of defendants' violation of plaintiff's federal civil rights to due process protected by the first and fourteenth amendments to the United States Constitution, for conspiracy to violate plaintiffs' civil rights and for defamation of character, all under 42 U.S.C. Section 1983 and applicable New Mexico law. Plaintiffs also seek punitive damages from defendants Merrill and Gattis based on their willful, reckless and conscious disregard for plaintiff's constitutional rights. Jurisdiction is invoked pursuant to 28 U.S.C. Section 1331 and 1343 and New Mexico law. The parties hereto stipulate and agree that venue is properly laid in this district and that the United States District Court

for the District of New Mexico has jurisdiction over the parties and the subject matter of this action.

2. GENERAL NATURE OF THE CLAIMS OF THE PARTIES:

(A) Plaintiff Claims:

(1) Defendants, acting under color of state law, violated plaintiff's federal civil rights by wrongfully terminating him from County employment without due process and based on plaintiff's exercise of his first amendment rights to freedom of speech.

(2) Defendants' alleged reason for terminating plaintiff Ewers, because his job was abolished and the job of County Manager was created, was pretextual in nature, arbitrary, capricious, intentional and malicious.

(3) Defendants' public accusations of dishonesty made against plaintiff were without basis, were stigmatizing and formed part of the basis for plaintiff's pretextual firing.

(4) By insisting on the pretext of plaintiff's job being abolished, defendants further violated plaintiff's due process rights by depriving him of the right to a hearing on his discharge.

(5) Defendants conspired together to wrongfully terminate plaintiff and wrongfully refuse to afford plaintiff his rights guaranteed by due process.

(6) Defendants' conduct further constituted defamation of plaintiff's character.

(7) As a result of defendants' conduct, plaintiff is entitled to recover compensatory and punitive damages, costs and reasonable attorneys fees.

(B) Defendants Claim:

Defendants deny having violated Plaintiff Ewers' constitutional rights. The County Commission voted to eliminate the position of Road Superintendent since it did not provide the county with services sufficient to justify being a full time position. Both Defendants Merrill and Gattis were concerned with operating Curry County more efficiently and economically. The decision to abolish the Road Superintendent position was a policy decision made pursuant to Board of County Commissioner's legislative authority. The purpose of the decision was to reorganize management of the road department.

During the January 19, 1981 Commission meeting, Defendants Merrill and Gattis did not accuse Plaintiff Ewers of dishonesty or any other acts which would tend to stigmatize or damage Plaintiff's ability to locate subsequent employment. At no time did Defendants Merrill or Gattis falsely accuse Plaintiff, defame or stigmatize Plaintiff's character or reduce Plaintiff's ability to locate subsequent employment. The alleged false accusations did not form a basis for abolishing the position of Road Superintendent. The decision to eliminate the Road Superintendent position did not implicate Plaintiff's liberty interest.

Assuming Plaintiff's liberty interest was implicated, adequate remedies were provided for redress. Plaintiff failed to avail himself of the same. Defendants at no time refused to provide Plaintiff a forum to clear his

name. The availability of recourse to a constitutionally sufficient administrative procedure and other state remedies satisfies due process where Plaintiff fails or declines to take advantage of the same.

Defendants Merrill and Gattis are absolutely immune from liability related to the elimination of the Road Superintendent position since the decision is a legislative function related to policy and decision making. The decision was made contemporaneously with efforts to re-organize the road department which included appointment of district road foremen and creation of a new position called County Manager.

Assuming Defendants Merrill and Gattis are not absolutely immune from liability related to elimination of the Road Superintendent position, they are entitled to a qualified immunity. At all times material, Defendants Merrill and Gattis acted in good faith and with a reasonable belief that their acts did not or would not violate Plaintiff Ewers' constitutional rights.

At no time did Plaintiff engage in constitutionally protected speech. Plaintiff did not speak out about matters of public concern. Plaintiff, in the normal course of his duties, merely offered constructive suggestions to the Commission with respect to certain road department functions.

Assuming Plaintiff exercised First Amendment rights, the exercise of First Amendment rights was not a motivating or substantial factor in the decision to eliminate the Road Superintendent position.

Inasmuch as the Court's June 25, 1984 Order dismisses the deprivation of property without due process

of law, equal protection and conspiracy claims, Defendants do not address these issues herein.

3. UNCONTROVERTED FACTS. The following facts are established by admission in the pleadings or by stipulations of counsel:

(1) Plaintiff is a resident and citizen of the State of New Mexico.

(2) Beginning in August, 1977 plaintiff was employed by defendant Board of County Commissioners as Road Superintendent for Curry County.

(3) Plaintiff was employed by defendant Board of County Commissioners until March 1, 1981.

(4) Defendant Board is a political subdivision of the State of New Mexico organized under the laws of New Mexico.

(5) Defendants Merrill and Gattis were members of the Board and acted under color of state law within the scope of their official duties at all times material.

(6) On January 19, 1981, defendants created the position of County Manager which was filled by a person other than plaintiff Ewers.

(7) On January 19, 1981, the applicable Curry County ordinance provided that a county employee could not be terminated without good cause unless his or her job was abolished.

4. CONTESTED ISSUES OF FACTS: The contested issues of facts remaining for decision are:

(a) Whether defendants terminated plaintiff from his employment as Road Superintendent.

## App. 6

(b) Whether his employment ended because his job was abolished and the job of the County Manager was created.

(c) Whether defendants' conduct in abolishing his job and creating the job of County Manager was pretextual in nature, arbitrary, capricious, intentional and malicious.

(d) Whether defendants' conduct accusing plaintiff of dishonesty by "padding" the books with regard to the County's coop road project was publicly made, was false, was stigmatizing, resulted in his pretextual firing and has had the general effect of damaging plaintiff's ability to get other employment.

(e) Whether defendants' conduct accusing plaintiff of dishonesty by "padding" the books with regard to the County's coop road project impugned plaintiff's character.

(f) Whether defendants conspired together to violate plaintiff's civil rights.

(g) Whether plaintiff was entitled to notice and hearing.

(h) Whether defendants wrongfully refused to afford plaintiff his rights to notice and an opportunity to be heard 1) on the issue of his pretextual firing, and 2) in a name clearing hearing following defendants' public accusations of dishonesty, to which he was entitled in accordance with due process.

(i) Whether the conduct of defendants Merrill and Gattis was willful, conscious, reckless and undertaken with deliberate indifference to plaintiff's rights.

App. 7

(j) Whether defendants' wrongful and unconstitutional conduct has caused plaintiff damages and if so the nature and amount of such damages.

(k) Whether defendants' conduct was undertaken in retaliating [sic] for plaintiff's exercise of his first amendment rights to free speech.

(l) Whether defendants' conduct deprived plaintiff of a constitutionally protected liberty interest.

(m) Whether under New Mexico law, plaintiff had a property right in continued employment based on the county ordinance requiring good cause for termination, or some other legitimate claim of entitlement, such as a mutually explicit understanding between the parties.

(n) Whether defendants' conduct deprived plaintiff of a constitutionally protected property interest.

(o) The nature and scope of plaintiff's duties as Road Superintendent.

(p) The nature and scope of the County Manager's duties.

(q) Whether plaintiff requested a hearing to challenge the decision to terminate him by elimination of the position of Road Superintendent.

(r) If plaintiff did not request such a hearing, whether his failure to do so was justified because such request would have been futile.

(s) Whether plaintiff's failure to submit an application for the position of County Manager was justified because to do so would have been futile.

## App. 8

(t) Whether reorganization of the road department was contemporaneous with the decision to abolish the Road Superintendent.

(u) Whether Defendants Merrill and Gattis acted in good faith and with a reasonable belief that elimination of the Road Superintendent position did not or would not violate Plaintiff's constitutional rights.

(v) Whether Plaintiff failed to avail himself of constitutionally adequate state remedies.

(w) Whether Plaintiff's alleged exercise of First Amendment rights was a substantial or motivating factor in the decision to eliminate the Road Superintendent position.

(x) Whether the position of Road Superintendent would have been eliminated even in absence of Plaintiff's alleged First Amendment speech.

### 5. CONTESTED ISSUES OF LAW:

(a) Whether defendants violated plaintiff's federal civil rights by wrongfully terminating him from county employment without due process based on the pretextual nature of his firing.

(b) Whether defendants' conduct in wrongfully terminating plaintiff violated his federal civil rights in retaliation of [sic] his exercise of first amendment rights to freedom of speech.

(c) Whether defendants' conduct accusing plaintiff of dishonesty by "padding" the books with regard to the County's coop road project was publicly made, was

App. 9

false, was stigmatizing, resulted in his pretextual firing and has had the general effect of damaging plaintiff's ability to get other employment.

(d) Whether defendant's conduct violated plaintiff's federal civil rights by failing to afford him notice and a name clearing hearing consistent with due process after accusing plaintiff of "padding" the books and terminating him therefor in violation of a protected liberty intererst [sic].

(e) Whether defendants' alleged reason for terminating plaintiff, because his job was abolished and the job of county manager was created, was pretextual in nature, arbitrary, capricious, intentional and malicious.

(f) Whether defendants['] conduct in violation of plaintiff's first amendment and due process rights caused plaintiff damages which he is entitled to recover and further whether such conduct was willful, reckless and taken with deliberate indifference to plaintiff's rights entitling plaintiff to recover punitive damages from defendants Merrill and Gattis.

(g) Whether defendants Merrill and/or Gattis, in engaging in conduct in violation of plaintiff's federal civil rights, did so in good faith.

(h) Whether plaintiff is entitled to recovery [sic] reasonable attorneys' fees and costs in this matter based on defendants' wrongful conduct.

(i) Such other legal issues as are implicit in the contested and uncontroverted facts set out in this Order.

(j) Whether the decision to eliminate the Road Superintendent position was a legislative act.

App. 10

(k) Whether Defendants Merrill and Gattis are entitled to absolute immunity for legislative acts.

(l) Whether constitutionally adequate remedies were available for Plaintiff's redress of alleged deprivation of liberty interest.

(m) Whether Plaintiff's failure to avail himself of the adequate state remedies defeats Plaintiff's claim of deprivation of due process of law.

(n) Whether Defendants are entitled to recovery of attorneys' fees and costs in this matter since Plaintiff's claim is frivolous, unreasonable and has no foundation.

(o) Whether the statements purportedly made by Plaintiff constituted constitutionally protected speech.

6. EXHIBITS: There are offered in evidence the following:

(a) Plaintiff's exhibits:

(1) Minutes of the meeting of the Board of Curry County Commissioners, August 15, 1977.

(2) Minutes of regular meeting of the Board of Curry County Commissioners, January 5, 1981.

(3) Minutes of a special meeting of the Board of Curry County Commissioners, January 12, 1981.

(4) Regular meeting of the Board of Curry County Commissioners, January 19, 1981.

(5) Letter of Charles Stockton to Walter Ewers, January 20, 1984.

App. 11

(6) Letter of Chaves County Manager, to Anita Merrill, March 9, 1981.

(7) Curry County personnel policies, February 2, 1976.

(8) Curry County organizational chart, August 10, 1981.

(9) Minutes of Meeting of the Board of Curry County Commissioners, January 18, 1982.

(10) Handwritten notes of Bill Crenshaw, February 3, 1982.

(11) Minutes of Meeting of the Board of County Commissioners, March 1, 1982.

(12) Plaintiff's personnel file.

(13) Chaves County Board of Commissioners classification plan, County Manager (job description).

(14) Curry County budget and fiscal salary documents relating to the Road Department for fiscal years 1977 through 1983.

(15) Document dated August 6, 1982 on Curry County Commissioners letterhead, which appears to be a response to Jack Jeter's age discrimination claim filed with EEOC, with attachments.

(b) Defendants' exhibits:

A. County Commission minutes dated August 15, 1977.

App. 12

- B. County Commission minutes dated January 1, 1981.
- C. County Commission minutes dated January 12, 1981.
- D. County Commission minutes dated January 19, 1981.
- E. Letter from Charles Stockton to Walter Ewers dated January 20, 1981.
- F. Curry County Personnel Policy dated February 2, 1976.
- G. Clovis New[s] Journal (February 11, 1981).
- H. County budget and salary documents for road department for years 1977 through 1983.
- I. Documents contained in Plaintiff's Social Security file.
- J. Documents contained in files maintained by the City of Texico, New Mexico pertaining to co-op paving projects undertaken with the County of Curry and the State of New Mexico Highway Department.
- K. County Commission Minutes dated February 2, 1981.
- L. Curry County Organizational Chart dated August 10, 1981.
- M. Clovis News Journal (February 2, 1981).

(c) If other exhibits are to be offered, the offering party will mark his own exhibits and make a list thereof. Lists of exhibits will be furnished to all opposing

counsel and the Court at least 10 days prior to trial. At that time all such exhibits will be made available for examination by opposing counsel. This rule does not apply to rebuttal exhibits which cannot be anticipated.

(d) Any counsel requiring authentication of any exhibit must so notify in writing the offering counsel within 5 days after the exhibit is made available to opposing counsel for examination. Failure to do so is an admission of authenticity.

(e) Any other objections to admissibility of exhibits must, where possible, be made at least three days before trial, and the Court notified of such objections. Where possible, admissibility will be ruled on before trial, and objections reserved for the record.

(f) At time of trial each counsel will furnish to the Court four copies (and one copy to each opposing counsel) of the list of all exhibits to be offered.

(g) All exhibits will be offered and received in evidence as the first item of business at the trial.

7. Any party proposing to offer all or any portion of a deposition shall notify opposing counsel at least 10 days before trial of the offers to be made (unless the necessity for using the deposition develops unavoidably thereafter). If objection is to be made, or if additional portions of a deposition are to be requested, opposing counsel will notify offering counsel at least 5 days before trial of such objections or requests. If any differences cannot be resolved, the Court must be notified in writing of such differences at least 3 days before trial.

8. DISCOVERY: Discovery is complete.

9. WITNESSES:

(a) In the absence of reasonable notice to opposing counsel to the contrary, plaintiff will call or will have available at trial:

Plaintiff

Plaintiff may call:

Anita Merrill	John Puternosker
Michael Gattis	Cleve Peake
Charles Stockton	Jack Jeter
James Williams	Fain Wilson
Travis Stovall	Cecil Burch
Ernest Cooper	Billy Dixon
John R. Hadley	Lester Hokum
Florine Hawkins	William Moberly
Gilbert Gutierrez	Joe Montgomery
Bill Crenshaw	Gary Hickman
Claude Burkett	Bill Bonem
Ray Tidwell	J. E. Hamilton
Grady Hamilton	Joe Bryant
Tom Frasier	Ralph Stanfield
Dwayne Billingsly	Cleave Tieg
Cullen Williams	C. P. Burleson
Randy Beevers	Wayne Bateman
Jim Watson	Worth Smelser
Tony Larra	Ralph Ditto
D. K. Kelly	Keith Simpson
Clyde Shaddick	Susan Sealy
Lynn Westbrook	

Any witness on defendants' will or may call list

(b) In the absence of reasonable notice to opposing counsel to the contrary, defendants will call, or will have available at the trial:

Defendants' witnesses:

Anita Merrill	Travis Stovall
Michael Gattis	
Florine Hawkins	
Bill Crenshaw	

Defendants may call or may have available at trial:

Mrs. Marie Chistian
Cecil Burch
Clyde Shadducks
Butch Billingsley
Ray Tidwell
Gary Hickman
Tom Frazier
Randy Beavers
Joe Montgomery
Susan Sealy
Cullen Williams
Shorty Burkett
Worth Smelsen
Ralph Ditto
Gilbert Gutierrez
James Williams

No witnesses except rebuttal witnesses whose testimony cannot be anticipated will be permitted to testify unless his or her name is furnished to the Court and opposing counsel no later than 30 days prior to the time set for trial. Any exceptions thereto must be on order of the Court for good cause showing.

11. AMENDMENTS TO PLEADINGS: None at this time.

12. OTHER MATTERS: The following additional matters to aid in the disposition of this action were deter-

mined: Jury instructions shall be filed five days prior to trial date.

13. MODIFICATION-INTERPRETATION: This pre-trial order has been formulated after conference at which counsel for the respective parties have appeared. Reasonable opportunity has been afforded counsel for corrections or additions prior to signing by the Court. Hereafter, this order will control the course of the trial and may not be amended except by consent of the parties and the Court, or by order of the Court to prevent manifest injustice. The pleadings will be deemed merged herein. In the event of ambiguity in any provision of this order, reference may be made to the record of this conference to the extent reported by stenographic notes, and to the pleadings.

14. TRIAL SETTING: The case is set for jury trial on the July 16, 1984 trailing docket in Roswell, New Mexico at 1:30 p.m.

15. MEMORANDUM: Estimated length of trial is four days. Possibility of settlement of this case is fair.

16. EXCEPTIONS:

Defendants except to the statement in ¶ 1 that Plaintiff Ewers has brought any claim pursuant to "applicable New Mexico Law." The complaint alleges causes of action based on federal law only.

Defendants except to Uncontroverted Fact number 6 in ¶ 3. Defendants admit that on January 19, 1981, the position of County Manager was created. Defendants did not fill the position of County Manager on January 19, 1981. Plaintiff Ewers was not selected for the position of County Manager.

Defendants except to Uncontroverted Fact number 7 in ¶ 3. The personnel policy effective on January 19, 1981 stated that "employees cannot be discharged without cause, unless [the] position is abolished."

References in ¶ 1 to causes of action for conspiracy and defamation must be struck since the Court dismissed the same in its Order of June 25, 1984. Plaintiff's claims in ¶ 2, numbered 5 and 6 are likewise to be struck pursuant to the June 25, 1984 Order. Contested Issues of Fact lettered (f), (g), (h), (l), (m), (n), (q), (r) and (s) should be struck pursuant to the June 25, 1984 Order.

DATED: .....

JUAN G. BURCIAGA  
UNITED STATES DISTRICT JUDGE

APPROVED:

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App. 18

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